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IN THE

Supreme Court of the United States

OCTOBER TERM, 1940

No. 161

MARTIN ENGEBRETSON, TRUSTEE OF THE ESTATE OF THE BRICTSON MANUFACTURING COMPANY, A CORPORATION, BANKRUPT, *Petitioner,*

vs.

RALPH M. WEST, AND THE AETNA CASUALTY AND SURETY COMPANY, A CORPORATION.

No. 162

MARTIN ENGEBRETSON, TRUSTEE OF THE ESTATE OF THE BRICTSON MANUFACTURING COMPANY, A CORPORATION, BANKRUPT, *Petitioner,*

vs.

JOHN T. MARCELL, HARRY S. BYRNE, AND FIDELITY AND DEPOSIT COMPANY OF MARYLAND, A CORPORATION.

PETITIONER'S REPLY BRIEF

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INDEX

	Page
Statement of Facts	1
Respondents' Points I and III	2
Paramount Character of Bankruptcy Law	3
Rem Jurisdiction	3
Superior Jurisdiction	5
Exclusive Jurisdiction	8
Jurisdiction Confused	10
Respondents' Point II	12
Misconception Cases Cited	12
Four Month Rule	14

CASES CITED

Acme Harvester Co. vs. Beekman Lumber Co., 222 U. S. 300	3, 4
Alderson vs. Temple, 4 Burrows' Reports 2235	19, 20
American Surety Co. vs. Moretta, 287 U. S. 513	17, 18
Benedict, In re, 140 Fed. 55	5
Bingham vs. Fairweather, 5 N. E. 265	3
Brictson vs. Close, 25 Fed. (2d) 794	13
Brig Ann, The, 9 Cranch. 289	3
Buck vs. Colbath, 3 Wall. 334	11
Carlson vs. Kirchman, 131 Nebr. 229, 267 N. W. 452	18
Carpo vs. Kelly, 16 Wall. 610	4
City Bank of New Orleans, Ex parte, The, 3 How. 292	9
Collet vs. De Gols & Ward Talbot Case 65	6, 15
Cooper vs. Chitty, 1 Burrows 20	15
Connor vs. Long, 104 U. S. 228	7
Devon vs. Watts, 1 Douglas' Reports 86	20
Duffield vs. Horton, 73 N. Y. 218	6
Edison Elec. Ill. Co. vs. Tibbets (1 C. C. A.), 241 Fed. 468	6
Engebretson vs. West, et al. (Neb.), 277 N. W. 433	7
Frazier, et al., vs. Southern Loan & Trust Co., 99 Fed. 707	13
Gamble vs. Daniel (8 C. C. A.), 39 Fed. (2d) 447	8
Gratiot County State Bank vs. Johnson, 249 U. S. 246	4
Gross vs. Irving Trust Co., 289 U. S. 342	5
Harkins vs. Brundage, 276 U. S. 36	12
Hart vs. Sansom, 110 U. S. 151	3
Henderson, In re, 9 Fed. 196	5
Hicks, In re, 107 Fed. 910	5
Hitchcock vs. Sedgewick, 2 Vernon's Reports 155	6
Howard vs. Crompton, 14 Blatchford 328	6, 16
Int. Bank vs. Sherman, 101 U. S. 403	6, 17
Int. Shoe Co. vs. Pinkus, 278 U. S. 261	3
Kelb vs. Feuerstein, 308 U. S. 433	4
Lion Bonding & Surety Co. vs. Karatz, 262 U. S. 640	12
Marcell vs. Engebretson (8 C. C. A.), 74 Fed. (2d) 93	10, 11, 22
Marshall vs. Knox, 16 Wall. 551	9
May vs. Henderson, 268 U. S. 111	9
Mays vs. Mfgrs. Nat. Bank, 64 Pa. St. 74	6
Meek vs. Centre County Banking Co., 268 U. S. 426	4
Miller vs. U. S., 11 Wall. 268	4
Mondou vs. N. Y., New Haven & Hartford Ry. Co., 223 U. S. 1	8
Palmer vs. Texas, 212 U. S. 118	12
Pepper vs. Litton, 308 U. S. 295	13
Pickens vs. Roy, 187 U. S. 177	13
Randolph vs. Scruggs, 190 U. S. 533	21
Safady Bros., In re (D. C.), 228 Fed. 538	5, 6
Sexton vs. Dreyfus, 219 U. S. 339	5, 9

Shawhan vs. Wherritt, 7 How. 627 15
Smith vs. Mills, 1 Coke's Reports 481 ..... 15, 19
Steelman vs. All Continent Corp., 301 U. S. 278 8
State Bank of Chicago vs. Cox (7 C. C. A.), 143 Fed. 91 6
Stevens vs. Mech. Savings Bank, 101 Mass. 109 6
So. Ry. Co. vs. Cole (Ga.), 176 S. E. 512 6
Straton vs. New, 283 U. S. 318 4
Thompson vs. Magnolia Petroleum Co., 309 U. S. 478 9
Tyler vs. Judges (Mass.), 55 N. E. 812 4
U. S. F. & G. vs. Bray, 225 U. S. 205 8
U. S. vs. Mack, 295 U. S. 480 3
Watts, In re, 190 U. S. 1 5
Weedman Stave Co., In re (D. C.), 199 Fed. 948 14
Whitney vs. Wenman, 198 U. S. 539 9
Wickersham vs. Nicholson (Pa.), 14 S. & R. 118 6
Wiswall vs. Campbell, 93 U. S. 347 8
Worseley vs. Demattos, 1 Burrows' Reports 467 18

TEXT BOOKS

2 Blackstone, 3rd Ed. 485 15
2 Collier on Bankruptcy, 13th Ed. 1243, 1244 18
1 Clark, The Law of Receivers, 1st Ed., Secs. 330, 337, pp. 407, 437 ..... 5, 6, 4
38 C. J. 33 4

STATUTES

Bankruptcy Law of 1867, Sec. 5021—8th 22
Bankruptcy Law of 1898: 14, 16, 17
Section 3 ..... 14, 16, 17, 18, 21
Section 60 ..... 14, 16, 17, 18, 20, 21
Section 67 15
English Laws:
13 Eliz., c. 7, Sec. 2 ..... 16, 18
1 Jac. 1, c. 15 ..... 16, 18, 19
21 Jac. 1, c. 19 16
19 Geo. II, c. 32 21
4 Geo. III, c. 33 16
46 Geo. III, c. 65 .....

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PETITIONER'S REPLY BRIEF

Respondents have failed to refer to any principle of bankruptcy law, but have referred to principles of general law, as though they applied to the cases at bar. Petitioner hopes this reply brief may be of aid to the court.

RESPONDENTS' POINTS I AND III

RESPONDENTS BASE THEIR POINTS I AND III ON THE LANGUAGE OF THE CIRCUIT COURT OF APPEALS IN THE TWO CASES AT BAR (R. 216, 217) SUBSTANTIALLY AS FOLLOWS: THE CONSTRUCTIVE POSSESSION OF THE PROPERTY WAS IN THE STATE COURT AND FOR THAT REASON THE COURT OF BANKRUPTCY WAS WITHOUT JURISDICTION TO DEAL WITH IT, IT BEING IN THE EXCLUSIVE JURISDICTION OF THE STATE COURT, AND THE NEBRASKA TRUSTEES HAD THE RIGHT TO ADMINISTER IT.

THE CIRCUIT COURT OF APPEALS HAS FAILED TO GIVE EFFECT TO THE PARAMOUNT CHARACTER OF THE BANKRUPTCY LAW, AND THE REM, SUPERIOR AND EXCLUSIVE JURISDICTION OF THE BANKRUPTCY COURT.

THE CIRCUIT COURT OF APPEALS HAS CONFUSED THE BANKRUPTCY COURT'S CONCURRENT, OR SUMMARY JURISDICTION, TO DETERMINE QUESTIONS AS TO TITLE OF OR RIGHTS AND INTERESTS OF THE BANKRUPT IN SPECIFIC PORTIONS OF HIS ESTATE, THAT IS TO MAKE SUCH PORTIONS OF THE ESTATE AVAILABLE FOR LIQUIDATION AND ADMINISTRATION, WITH THE BANKRUPTCY COURT'S EXCLUSIVE JURISDICTION TO LIQUIDATE AND ADMINISTER THE ASSETS OF THE BANKRUPT'S ESTATE.

We believe that the following analysis of the Bankruptcy Law will show these things.

Paramount Character of Bankruptcy Law.

The liquidation of the assets of the bankrupt corporation was no more a part of the forfeiting of the right of the corporation to do business, as a foreign corporation, than the liquidation of the assets of a domestic corporation is a part of the forfeiting of the charter of such corporation. It is well settled that the liquidation of the assets of a domestic corporation is no part of the forfeiting of its charter. *Chicago T. & T. Co. vs. Forty-One Thirty-Six W. Bldg.*, 302 U. S. 120, 126, 82 L. Ed. 147, 58 S. Ct. 125, 128. "States may not pass or enforce laws to interfere with or complement the Bankruptcy Act, or to provide additional or auxiliary regulations." *Int. Shoe Co. vs. Pinkus*, 278 U. S. 261, 265, 73 L. Ed. 318, 49 S. Ct. 108. By virtue of the paramount character of the National Bankruptcy Act, whatever jurisdiction, if any, that the state court had over the assets of the bankrupt was superseded by supervening bankruptcy.

Rem Jurisdiction.

A bankruptcy proceeding is *in rem*. *Acme Harvester Co. vs. Beekman Lumber Co.*, 222 U. S. 300, 307, 56 L. Ed. 408, 32 S. Ct. 96. *Nature of Action in Rem.* An action *in rem* is always based on a statute because equity jurisdiction is exercised only *in personam*. *Hart vs. Sansom*, 110 U. S. 151, 154, 28 L. Ed. 101, 3 S. Ct. 586. A judgment *in rem* is conclusive with respect to the thing itself and operates as an absolute change of property. *Bingham vs. Fairweather*, 5 N. E. 265, 266. Jurisdiction *in rem* is acquired by seizure of the *res*. *The Brig Ann*, 9 Cranch. 289, 291, 3 L. Ed. 734. *U. S. vs. Mack*, 295 U. S. 480, 484, 79 L. Ed. 1559, 55 S. Ct. 813. Congress has the power to provide how seizure shall

be made under a federal law. *Miller vs. U. S.*, 11 Wall. 268, 296, 20 L. Ed. 135. Actual notice of a *rem* action is unnecessary. Seizure is sufficient notice. *Tyler vs. Judges* (Mass.), 55 N. E. 812. In *Kalb vs. Feuerstein*, 308 U. S. 433, 84 L. Ed. 280, 60 S. Ct. 343, the jurisdiction of the state court was superseded, although no notice was given to that court. Filing of notice of *lis pendens* is unnecessary. 38 *C. J.* 33. *Seizure in Bankruptcy.* "The exclusive jurisdiction of the bankruptcy court is so far *in rem* that the estate is regarded as in *custodia legis* from the time of the filing of the petition." *Acme Harvester Co. vs. Beekman Lumber Co., supra.* "The adjudication is, for the purpose of administering the debtor's property, that is, in its legislative effect, conclusive upon all of the world." *Gratiot County State Bank vs. Johnson*, 249 U. S. 246, 63 L. Ed. 587, 39 S. Ct. 263. To the same effect is *Meek vs. Centre County Banking Co.*, 268 U. S. 426, 429, 69 L. Ed. 1028, 45 S. Ct. 560, and *Straton vs. New*, 283 U. S. 318, 321, 75 L. Ed. 1060, 51 S. Ct. 465. The estate of the bankrupt consists of all property, rights, titles and interests that the trustee in bankruptcy may make available to pay the expense of administration and debts. The *rem* jurisdiction of the bankruptcy court passed the title of the estate of the bankrupt to the trustee. The title passed *eo instanti. Carpo vs. Kelly*, 16 Wall. 610, 629, 21 L. Ed. 430. Since the date of the filing of the petition is the date of the line of cleavage, the title to the estate passes regardless of where located or how held.

Superior Jurisdiction.

Superior Jurisdiction. The superior jurisdiction of the bankruptcy court makes effective the seizure of the estate of the bankrupt regardless of how held. *Gross vs. Irving Trust Co.*, 289 U. S. 342, 344, 77 L. Ed. 1243, 53 S. Ct. 605. *Actual Reach.* That portion of the estate in the possession of the bankrupt actually or constructively, at the time of the filing of the petition, comes within the actual reach of the bankruptcy court. The balance of the estate comes within the court's constructive reach. One reach is as effective as the other.

> "While in ordinary equitable proceedings being *in personam* the actual seizure of property by one court may take precedence over the constructive seizure of another, nevertheless bankruptcy proceedings are *in rem* and the filing of the petition is constructive seizure and equal to actual seizure as far as cutting off all other jurisdictions."
>
> 1 *Clark, "The Law of Receivers,"* 1st Ed., Sec. 330, p. 407.

"The filing of the petition in bankruptcy is not the commencement of a suit against the failing debtor to recover debts due. It contemplates rather the collection and distribution of an estate. (*In re Henderson,* 9 Fed. 196, 197. *In re Hicks,* 107 Fed. 910, 911.) The very property sought to be reached has been by virtue of Acts of Congress brought *sub modo* under Federal influence and control by the filing of the involuntary petition which, so to speak, imposes a status on all of the property of the alleged bankrupt everywhere. (*In re Benedict,* 140 Fed. 55, 59. *In re Watts,* 190 U. S. 1, 28, 47 L. Ed. 933, 941, 23 S. Ct. 718, ...) At the date of the petition in Bankruptcy the creditors acquire a right *in rem* against the assets (*Sexton vs. Dreyfus,* 219 U. S.

339, 345, 55 L. Ed. 244, 245, 31 S. Ct. 256, 257)."

2 *Clark, "The Law of Receivers,"* 1st Ed., Sec. 337, p. 437.

The insertion of the citations in the above quotation is ours. The author cited the same in a footnote.

Bankruptcy and Attachment and Injunction. The filing of the petition in bankruptcy is a caveat to all the world, and, in effect, an attachment and injunction. *Int. Bank vs. Sherman,* 101 U. S. 403, 406, 25 L. Ed. 866. "Attachment" is used in the broad sense indicating a seizure of such rights, titles and interests as may be made available for the payment of the claims of creditors, for the purpose of bringing the same within the custody of the court. *In re Safady Bros.* (D. C.), 228 Fed. 538, 541. The filing of a petition in bankruptcy amounts to an injunction, because it is a notorious judicial act of which all are obliged to take notice. One of the earliest cases in this connection is *Hitchcock vs. Sedgewick* (1690), 2 Vernon's Reports 155, cited in *Collet vs. De Gols & Ward* (1734), Talbot's Case 65. These two cases are cited with approval in *Mays vs. Manufacturers National Bank,* 64 Pa. St. 74, 77, 3 Am. Rep. 573. The following cases are to the same effect: *Wickersham vs. Nicholson* (Pa.), 14 S. & R. 118, 119; *Howard vs. Crompton,* 14 Blatchford 328, Fed. Cas. 6758; *So. Ry. Co. vs. Cole* (Ga.), 176 S. E. 512; *Stevens vs. Mech. Savings Bank,* 101 Mass. 109; *Duffield vs. Horton,* 73 N. Y. 218; *Edison Elec. Ill. Co. vs. Tibbets* (1 C. C. A.), 241 Fed. 468, and *State Bank of Chicago vs. Cox* (7 C. C. A.), 143 Fed. 91, 93.

> "The assignment in bankruptcy made in one District, so far as its operation is a matter of law, operates with the same effect in all districts. And it operates upon the title to the property of the debtor wherever it is situated so as to preserve it, according to the provisions

of the act, for distribution under it, and so the title shall pass, as it required, without regard to any dealings with it, which it forbids. WHATEVER HARDSHIPS, IF ANY, MAY FOLLOW TO PRIVATE PERSONS WHO SELL OR BUY IT, AND ATTEMPT TO DIVERT IT TO THEIR OWN USE, FALLS UPON THEM, AS IN OTHER CASES, WHERE TITLES FAIL, EVEN IN THE HANDS OF INNOCENT, BECAUSE IGNORANT PURCHASERS."

Connor vs. Long, 104 U. S. 228, 240, 26 L. Ed. 723.

Constructive Reach. That portion of the estate of the bankrupt, not in the possession of the bankrupt actually or constructively, when the petition is filed, may be brought within the court's actual reach, by resorting to the jurisdiction of a state or federal court, as the case may be.

"The filing of the petition in the case at bar was a command to all the persons having possession of the property which the bankrupt at that moment owned to hold the same subject to the order of the court, and the trustee can proceed in either a State Court or a Federal Court to secure actual possession of the assets of the Bankrupt estate."

Engebretson vs. West, et al. (Neb.), 277 N. W. 433, 436.

This petitioner was plaintiff; West and the Nebraska trustees were the defendants in *Engebretson vs. West, et al., supra.* That action involved the same property involved in the cases at bar, but did not include the sureties on the bonds of West and the Nebraska trustees which the cases at bar does.

"The Circuit and District Courts have concurrent jurisdiction of 'all suits at law or in equity brought by an assignee in bankruptcy against any person claiming an adverse interest, or by any such person against an assignee touching any property or rights of the bank-

rupt transferable to or vested in such assignee'; R. S., sec. 4979; but such suits, when prosecuted, are no part of the bankruptcy proceeding. They are in aid of such a proceeding, but while progressing, are entirely separate from and independent of it. They are used by the Bankruptcy Courts to settle the rights of parties who are not subject to its jurisdiction in the suit in bankruptcy, and, who, therefore, cannot be affected by any judgment or decree that may be made in that case."

Wiswall vs. Campbell, 93 U. S. 347, 348, 23 L. Ed. 923.

Where a trustee in bankruptcy is entitled to resort to a court, other than bankruptcy, for relief, he may use a state court as well as a federal court. *Mondou vs. N. Y., New Haven & Hartford Ry. Co.*, 223 U. S. 1, 57, 56 L. Ed. 327, 32 S. Ct. 169. In *Steelman vs. All Continent Corporation*, 301 U. S. 278, 81 L. Ed. 1085, 57 S. Ct. 705, the trustee in bankruptcy was sustained in his resorting to a state court to have that court pass on the rights, if any, of the trustee in bankruptcy in certain assets. The superior jurisdiction made effective the seizure of the assets in question regardless of whether or not in the constructive possession of the state court.

Exclusive Jurisdiction.

Exclusive jurisdiction of the bankruptcy court, after the adjudication in bankruptcy, so far as the estate is concerned, covers only liquidation and administration. This jurisdiction may not be surrendered. *U. S. F. & G. vs. Bray*, 225 U. S. 205, 217, 56 L. Ed. 1055, 32 S. Ct. 620. *Concurrent Jurisdiction.* A bankruptcy court, after an adjudication, also exercises a concurrent jurisdiction, or as the court said in *Gamble vs. Daniel* (8 C. C. A.), 39 Fed. (2d) 447, 452, in speaking of the estate of the bankrupt, "in the collection

of such property there often arises questions as to the title of or rights and interest of the bankrupt in specific portions of that property. This necessitates determination by some court." The concurrent jurisdiction is used to make the certain portions of the estate above mentioned available for liquidation and administration under the exclusive jurisdiction. This concurrent jurisdiction may be surrendered. *Thompson vs. Magnolia Petroleum Co.*, 309 U. S. 478, 84 L. Ed. 624, 60 S. Ct. 628. This concurrent jurisdiction is limited to determining questions of titles or rights and interests of the bankrupt, which are determined by conditions that existed at the date that the petition in bankruptcy was filed. Of necessity this is so because the line of cleavage is of that date. On that date creditors acquired a right *in rem* against the assets. *Sexton vs. Dreyfus, supra.* After that date the bankruptcy court cannot be deprived of its exclusive jurisdiction over the estate. *May vs. Henderson*, 268 U. S. 111, 69 L. Ed. 870, 45 S. Ct. 456. A bankruptcy court's concurrent jurisdiction is usually called "summary jurisdiction" because always exercised in a summary manner, or by a summary proceeding in the nature of a plenary action but never a plenary action. *Ex parte The City Bank of New Orleans*, 3 How. 292, 312, 11 L. Ed. 603. *Whitney vs. Wenman*, 198 U. S. 539, 49 L. Ed. 1157, 25 S. Ct. 778. Summary jurisdiction, except by consent, can only be exercised where the bankrupt was in possession actually or constructively of the specific portion of the estate when bankruptcy supervened. The importance of possession is discussed in *Marshall vs. Knox*, 16 Wall. 551, 556, 557, 21 L. Ed. 481. The bankruptcy court's summary jurisdiction must not be confused with its actual or constructive reach or seizure. While the bankruptcy court, except with the consent of the adverse claimant, cannot exercise its summary jurisdiction, unless

the bankrupt was in possession of the specific portion of the estate in issue actually or constructively, at the time the petition in bankruptcy was filed; the bankruptcy court's constructive reach or seizure does not depend upon possession, as we have already pointed out. Concurrent or summary jurisdiction never passes title nor does it determine what court will liquidate and administer the estate. It only determines what title, right or interest, if any, the bankrupt had in specific property, in issue, at the time the petition in bankruptcy was filed. The only effect of a lack of summary jurisdiction is that the trustee must go into a state or federal court, as the case may be, to have his rights determined. The exclusive jurisdiction of the bankruptcy court will liquidate and administer the assets in issue.

Jurisdiction Confused.

The Circuit Court of Appeals has confused the concurrent, or summary, jurisdiction of the bankruptcy court, with its exclusive jurisdiction. What the bankruptcy court was attempting to do in *Marcell vs. Engebretson,* 74 Fed. (2d) 93, was to determine the title of or rights and interest of the bankrupt in the assets in question based on the conditions existing when bankruptcy supervened. That is, to make such specific portion of the estate available for liquidation and administration under the court's exclusive jurisdiction. That was an exercise of a concurrent or summary jurisdiction. Both the right to exercise that jurisdiction, as well as the title of or rights and interest to be determined, were limited to conditions existing when bankruptcy supervened. Since the rights to be determined were based on conditions existing when bankruptcy supervened, no question of exclusive jurisdiction was involved, because only supervening

bankruptcy would put in motion the latter jurisdiction. The bankruptcy law determined what court would liquidate and administer the estate of the bankrupt. However, the Circuit Court of Appeals, because of confusing the two jurisdictions, now holds that the exclusive jurisdiction, or the jurisdiction to liquidate and administer, was determined. While the bankruptcy court could not surrender its exclusive jurisdiction, the effect of the holding of the Circuit Court of Appeals, if sustained, will amount to such a surrender. As petitioner said in his petition herein, all the Circuit Court of Appeals did or could determine in *Marcell, et al., vs. Engebretson, supra,* was that the lower court was without summary jurisdiction. This concurrent jurisdiction could have been surrendered. In view of the fact the assets in question were part of the bankrupt estate, the effect of the judgment in *Marcell vs. Engebretson* was to surrender the concurrent jurisdiction in favor of a plenary action. An action for possession of the assets in question would be unavailing as the records show most of such assets have been dissipated. The judgment in *Marcell vs. Engebretson, supra,* did not and does not constitute *res judicata* of any material issue in the cases at bar. The cases at bar are plenary actions and do not interfere with any possession the state court has if it has any. *Buck vs. Colbath,* 3 Wall. 334, 18 L. Ed. 257.

RESPONDENTS' POINT II

RESPONDENTS HAVE A MISCONCEPTION OF THE CASES THEY CITE. NONE OF THE CASES CITED BY RESPONDENTS SUPPORT THE HOLDING OF THE CIRCUIT COURT OF APPEALS IN THE CASES AT BAR. NEITHER DOES THE FOUR-MONTH RULE HAVE ANY APPLICATION TO THE CASES AT BAR.

Misconception Cases Cited.

Palmer vs. Texas, 212 U. S. 118, was a case of two courts exercising a concurrent jurisdiction. The federal court was not without jurisdiction as a federal court. *Lion Bonding & Surety Co. vs. Karatz*, 262 U. S. 640, 642, 67 L. Ed. 1151, 43 S. Ct. 641. Both suits were alike in purpose. *Harkin vs. Brundage*, 276 U. S. 36, 44, 72 L. Ed. 457, 48 S. Ct. 268. The question was which of two courts had the better right to liquidate the assets. In other words, the federal court could and did relinquish its concurrent jurisdiction. If in the cases at bar, it were true that the bankruptcy court might relinquish to the state court its jurisdiction to administer the property of the bankrupt estate, it would not be justified in doing so. The bankruptcy court is the only court in which those lawfully interested in the bankrupt estate can be protected. The district court in its findings of fact (R_2. 62) finds that the greater portion of the assets that West turned over to the Nebraska trustees has already been dissipated, if that court's jurisdiction is sustained. $18,425.00 of that sum has gone to Brome, McGuire, Herdman, Cherry & Braithwaite, attorneys for the Nebraska trustees. $23,700.00 has gone to Foster, Moriarity, Marcell, Byrne & Wear, past and present Nebraska trustees. $2,500.00 has gone to David A. Fitch, the attorney for and the law partner of

West, and evidently the state court will allow the balance of $4,000.00 claimed by Fitch, if its jurisdiction is sustained (R. 178-180). $2,500.00 has gone to Mulfinger & Webb, attorneys for Close, *et al.*, in the case in which West was wrongfully appointed receiver (280 Fed. 297). We submit, it is fair to assume, that if the State Court is permitted to administer the assets of the bankrupt estate, that no part of the same will reach any creditor.

Pickens vs. Roy, 187 U. S. 177, and *Frazier, et al., vs. Southern Loan & Trust Co.,* 99 Fed. 707, were actions by judgment creditors to remove obstructions to the enforcement of judgments caused by fraudulent conveyances. They were very similar in effect to levying of executions on the property of the debtor. The suits were to enforce liens upon property fraudulently conveyed. These actions were not for the benefit of creditors at large. The distribution by the State Court in the quo warranto action, in theory, is for the benefit of creditors at large. It purports to distribute the assets of the bankrupt estate to creditors in a manner similar to that of the bankruptcy court.

Relative to *Brictson vs. Close,* 25 Fed. (2d) 794, 800, that was a case to determine whether West would turn the corporate assets in his possession to the Nebraska trustees or the corporation (R. 112, 113). It was decided before supervening bankruptcy and cannot be conclusive of the issues in the cases at bar arising out of the effect of supervening bankruptcy. *Pepper vs. Litton,* 308 U. S. 295, 302, 84 L. Ed. 160, 60 S. Ct. 238.

While the Circuit Court of Appeals did not in its opinion, in the cases at bar, rely on the Four-Month Rule in bankruptcy, respondents do urge this rule, as applying to the cases at bar. The Four-Month Rule has no application to the quo warranto action, the appointment of the Nebraska

trustees, or the possession of the assets of the bankrupt estate in the actual possession of West when bankruptcy supervened. First, the quo warranto law and the quo warranto proceeding thereunder conflict with the National Bankruptcy Law, in so far as distribution of the bankrupt's assets to creditors may be concerned, and are superseded by the bankruptcy proceeding. *In re Weedman Stave Co.* (D. C.), 199 Fed. 948, where the state law was superseded by the National Bankruptcy Law, the state court receiver was in actual possession of the corporate assets for more than four months before bankruptcy. However, he was required to give way to the bankruptcy trustee. Second, the Four-Month Rule affects only creditors at large and applies only to relief under Sections 3, 60 and 67 of the National Bankruptcy Act. None of these sections are applicable to the quo warranto action.

The Four Month Rule in Bankruptcy Is One of Limitation Affecting Only Creditors at Large.

The FOUR MONTH RULE is a rule of RELATION BACK and not one of repose directed against the paramount *rem* character of the National Bankruptcy Act. THE CONDUCT OF THE DEBTOR AND NOT A STATE LAW PUTS IT IN MOTION. The FOUR MONTH RULE is a modification of the English RULE OF RELATION BACK. The FOUR MONTH RULE like the RULE OF RELATION BACK is for the benefit only of creditors at large, since they are the only creditors who can take advantage of the National Bankruptcy Act.

The RULE OF RELATION BACK was very familiar under the English law at the time of the adoption of the United States Constitution. Under the English law at that time

the line of cleavage was at the date of the First Act of Bankruptcy and not at the time of the filing of the petition as it is under our law. An act of bankruptcy under the English law fixed the status of the debtor to be that of a bankrupt without an adjudication. "Once a bankrupt always a bankrupt under the old English law," 2 Blackstone, 3rd Ed. (1768) 485. The RULE OF RELATION BACK dates from 1570 (13 Eliz. c. 7, Sec. 2 (12)). The RULE OF RELATION BACK was first passed on in *Smith vs. Mills* (1584), 1 Coke's Reports 481, 506, where the court in effect holds that the bankrupt is to be considered civilly dead so far as his property is concerned. In *Collet vs. Degols* (1734), Talbott's Cases 65, it was contended that advantage might be taken of an act of bankruptcy although forty years had elapsed after it was committed. In *Cooper vs. Chitty* (1756), 1 Burrows' Reports 20, 32, the court, in part, said:

> "This relation * * * was introduced to avoid frauds. They vest in the assignee all the property that the bankrupt had at the time of what I may call the crime committed (for the old statutes considered him as a criminal); they make the sale by the commissioner good against all persons who claim by, from, or under the bankrupt after the act of bankruptcy and against all executions not served and executed before the bankruptcy act."

To the same effect is *Shawhan vs. Wherritt,* 7 How. 627, 644, 12 L. Ed. 847, 854.

Since the date of the commission of an act of bankruptcy, although it might be secret, was the date of the line of cleavage, and thereafter the debtor was considered civilly dead, the law worked a hardship on those dealing with the debtor without knowledge of such act of bankruptcy. The RULE OF RELATION BACK because of its harsh effect was modified by changes in the English law as follows: First, in the

case of payment of debts to the bankrupt before notice of an act of bankruptcy (1 Jac. I, c. 15) (1604); second, in the case of the sale of real property by the bankrupt where the commission was not sued out within five years after the secret act of bankruptcy (21 Jac. I, c. 19) (1623); third, in the case of payments by the bankrupt to creditors for goods sold (19 Geo. II, c. 32) (1746); fourth, in the case of conveyances, contract, and other dealings and transactions with a bankrupt, *bona fide* made and entered into more than two calendar months before the date of the issuing of the commission (46 Geo. III, c. 65) (1806).

Howard vs. Crompton, 14 Blatchf. 328, Fed. Cas. 6758.

While the FOUR MONTH RULE is still a RULE OF RELATION BACK, much of the hardship of the rule under the English law has been avoided. The FOUR MONTH RULE relates back for a period of four months to enable creditors to take advantage of the act of bankruptcy and fix the status of the debtor to be a bankrupt. It also relates back four months from the time of the filing of the petition in bankruptcy to undo the conduct of the debtor that is condemned by Sections 60 and 67 of the Bankruptcy Law. The line of cleavage under the FOUR MONTH RULE is the time of the filing of the petition in bankruptcy and not the time of the commission of the FIRST Act of Bankruptcy.

The FOUR MONTH RULE is a limitation where time is of the essence of the right created. The rights created are covered by Sections 3, 60 and 67 of the National Bankruptcy Act. The FOUR MONTH RULE does not apply to any other sections of the Bankruptcy Law.

The rights created are, because of certain acts of the debtor, which creditors at large could not defeat except for the bankruptcy law, to enable the creditors at large within

four months of such acts to:

First. Have the debtor adjudicated a bankrupt and defeat the debtor's fraudulent acts that are condemned by the bankruptcy law. That is, by virtue of Section 3, have the status of the debtor and his estate fixed to be that of a bankrupt, amounting to civil death (*Int. Bank vs. Sherman,* 101 U. S. 403, 25 L. Ed. 866), with its attending consequences, including, by virtue of Sections 60 and 67, the undoing of the debtor's fraudulent acts for the benefit of the creditors at large; or,

Second. If the debtor resorts to bankruptcy, upon which there is no time limitation, the rights created enable the creditors at large, through their representative, the trustee in bankruptcy, to undo, by virtue of Sections 60 and 67, the fraudulent acts of the debtor, that are condemned by the bankruptcy law, committed within four months of supervening bankruptcy, and have the debtor's estate liquidated by the bankruptcy court for the benefit of the creditors at large as though the debtor was dead.

The acts of bankruptcy are of two kinds: First, and this is true of every bankruptcy act, have the status of the debtor fixed to be that of a bankrupt (civilly dead); and second, under those acts dealing with the debtor's disposition of his property also defeat the fraudulent conduct of the debtor. Under the first English bankruptcy laws the acts of bankruptcy were of the first kind. Under the present law, the acts of bankruptcy are mostly of the second kind.

The fraudulent acts of the debtor that are condemned by the bankruptcy law are acts of bankruptcy only if bankbankruptcy supervenes inside of four months from the time the act or acts take place. The present acts of bankruptcy are still the acts of the fraudulent trader. *American Surety*

Co. vs. Moretta, 287 U. S. 513, 518, 77 L. Ed. 466, 53 S. Ct. 260, 262.

Involuntary bankruptcy is still a trader's bankruptcy, based on fraud on creditors at large. Every voluntary bankruptcy is still a trader's bankruptcy, so far as recovery of assets by virtue of the provision of the Bankruptcy Law (Sections 60 and 67), rather than a state law, are concerned. Outside of Sections 60 and 67, which cover debtor's conduct within the four months, all recoveries occasioned by the conduct of the debtor, are by virtue of the state law. The FOUR MONTH RULE does not apply to recoveries under state law. *Carlson vs. Kirchman,* 131 Nebr. 229, 267 N. W. 452. Every one of the acts of bankruptcy are based on the conduct of the debtor as an examination of the same will show.

The first act of bankruptcy is the well-known common-law fraudulent conveyance, which has been an act of bankruptcy since 1604 (1 Jac. I, c. 15). The fraudulent conveyance condemned by this act of bankruptcy is defeated by the trustee in bankruptcy, the representative of creditors at large, by virtue of Section 67 of the Bankruptcy Act, which originated in 1623 (21 Jac. I, c. 19), and quoted hereinafter.

The second act of bankruptcy, a preferential transfer, has been called a conventional fraud. 2 *Collier on Bankruptcy,* 13th Ed., p. 1243. It has been an act of bankruptcy since *Worseley vs. Demattos* (1758), 1 Burrows' Reports 467. A preference was not statutory in England until 1869 and in the United States until 1841. 2 *Collier on Bankruptcy,* 13th Ed., p. 1244. A preferential transfer is defeated by the trustee in bankruptcy, representing the creditors at large, acting under Section 60 of the Bankruptcy Act. This section condemns: first, transfers within four months before the petition in bankruptcy is filed; and second, transfers made after the petition filed. The first character of transfer has been

recoverable since *Alderson vs. Temple* (1768), 4 Burrows' Reports, p. 2235. The second character of transfer has been recoverable since *Smith vs. Mills* (1584), 1 Coke's Reports 481.

The Third and Fourth Acts of Bankruptcy, a preference through legal proceedings was condemned by law first in 1623 (21 Jac. I, c. 19), in the following language:

> "And for the better division and distribution of the lands, tenements, hereditaments, goods, chattels and other estate of such bankrupt to and among his or her creditors; (2) be it enacted, that the commissioners or the greater part of them shall and may upon oath or by any other way or means as to them shall seem meet, any person or persons for the finding out and discovery of the truth and certainty of the several debts due and owing to all such creditor and creditors as shall seek relief by such course of commission to be sued forth as aforesaid; (3) and that all and every creditor and creditors having security for his or their several debts, by judgment, statute, recognizance, specialty with penalty or without penalty, or other security or having no security, or having made attachments in London, or any other place, by virtue of any custom there used, of the goods and chattels of any such bankrupt, where there is no execution or extent served and executed upon any of the lands, tenements, hereditaments, goods, chattels and other estate of such bankrupts, before such time as he or she shall or do become bankrupt, shall not be relieved upon any such judgment, statute, or recognizance, specialty, attachment or other security for any more than a ratable part of their just and due debts, with the other creditors of said bankrupt, without respect to any such penalty, or greater sum contained in any such judgment, statute, recognizance, specialty with penalty, attachment or other security."

Time as a limitation in connection with an act of bankruptcy is not new. It was an act of bankruptcy under the Roman law before England had a bankruptcy law, to leave a judgment unsatisfied for thirty days. The preferential transfer through legal proceedings (the Third Act of Bankruptcy) is defeated by the trustee in bankruptcy, representing the creditors at large, acting under Section 60 of the Bankruptcy Act, if such proceedings has resulted in the sale of the property. If the legal proceedings has resulted in only a lien (the Fourth Act of Bankruptcy) it is defeated by the trustee in bankruptcy, representing the creditors at large, acting under Section 67 of the Bankruptcy Act.

The Fifth Act of Bankruptcy consists in the debtor making a general assignment for benefit of creditors, or while the debtor is insolvent a receiver or trustee is put in charge of his property.

The general assignment for the benefit of creditors was condemned by the English courts because it would rescind the whole system of the bankrupt laws, and instead of applying to the Great Seal, the debtor would choose his own trustee. *Alderson vs. Temple* (1768), 4 Burrows' Reports 2235. Also for the further reason that the debtor could no longer trade and, therefore, no longer pay his debts as a trader. In *Devon vs. Watts* (1779), 1 Douglas' Reports 86, 92, the court in this connection said:

> "It has been settled, over and over, that if a trader makes a conveyance of all of his property, that is, instantly, an Act of Bankruptcy. It is fraudulent. It destroys the capacity of trading. * * * It was a fraud in Jackson to deal with any one as a trader."

The general assignment for benefit of creditors, the exercising of the debtor's right to contract with respect to his

property, is defeated by the trustee in bankruptcy, representing the creditors at large, acting under Section 67.

Randolph vs. Scruggs, 190 U. S. 533, 47 L. Ed. 1165, 23 S. Ct. 710.

Putting a receiver or trustee in charge of the debtor's property while he is insolvent prevents the debtor from longer trading or paying his debts as a trader. This act of bankruptcy enables the creditors at large to have the status of the debtor fixed to be that of a bankrupt. That is the only purpose of this act of bankruptcy. This act of bankruptcy does not fall within the condemnation of Sections 60 or 67. This is an act of bankruptcy, if bankruptcy supervenes inside of four months, since it is by operation of law. It is superseded by bankruptcy at any time before it is completed. This results from the paramount character of the National Bankruptcy Act.

The Fifth Act of Bankruptcy consists of the debtor admitting in writing his inability to pay his debts and his willingness to be adjudicated a bankrupt. This is a well known act of bankruptcy (debtor's failure to pay or cessation of payment) expressed in different language and eliminating any necessity for a time element in connection with a failure to pay, to make it an act of bankruptcy.

The Roman law in force before England had a bankruptcy law, made it an act of bankruptcy: to leave a judgment unsatisfied for thirty days; and to admit without discharging a debt and taking no steps to pay it. The Eleventh Act of Bankruptcy under the statute of 4 Geo. III, c. 33, read:

> "Neglect to make satisfaction for any just debt to the amount of 100 pounds within two months after service of legal process for such debt upon any trader having privilege of Parliament."

The Eighth Act of Bankruptcy in our law of 1867 provided:

> "Eighth, who, being the banker, broker, merchant, trader, manufacturer, or miner, has fraudulently stopped payment or who has stopped and suspended and not resumed payment of his commercial paper, within a period of fourteen days, shall be deemed to have committed an act of bankruptcy, and to have become liable to be adjudged a bankrupt."

Wherefore, petitioner submits that nothing that was or could be decided in *Marcell vs. Engebretson, supra,* constitutes *res judicata* of any issue in the case at bar.

Respectfully submitted,

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